United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1900.

No. 1000. **23**

WILLIAM A. MELOY, APPELLANT,

vs.

JOHN F. KEENAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 5, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1900.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 28, 1900.

In the Court of Appeals of the District of Columbia.

WM. A. MELOY, Appellant,
vs.
JOHN F. KEENAN. } No. 1000.

a Supreme Court of the District of Columbia.

WILLIAM A. MELOY
vs.
JOHN F. KEENAN. } No. 25814. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration, &c.*

Filed December 9, 1884.

In the Supreme Court of the District of Columbia, Nov., 1884.

WILLIAM A. MELOY, Plaintiff,
vs.
JOHN F. KEENAN, Defendant. } At Law. No. 25814.

Now comes William A. Meloy, the above-named plaintiff, and sues the said defendant, John F. Keenan, for that whereas the said defendant heretofore, to wit, on or about the — day of Dec., 1881, to wit, at the city of Washington, was indebted to the said plaintiff in the sum of four hundred dollars for the work and labor, care and diligence, of the said plaintiff by him bestowed and performed for the said defendant and at his request, as attorney and as counsel of the said defendant, and upon his retainer in that certain suit in the supreme court of the District of Columbia, numbered 7458, in equity, for divorce and for dissolution of the bond of matrimony between Sarah J. Thomas (now the wife of the above-named defendant) and Johnson P. Thomas, and for moneys expended in said suit at his like request and for his benefit; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook

and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money when thereunto requested.

2&3 Nevertheless the said defendant, though often requested, hath not paid the money aforesaid nor any part thereof, but wholly neglects and refuses so to do, to the plaintiff's damage in the sum aforesaid. Wherefore the plaintiff prays judgment against the defendant for the sum of $400.00, with interest on the same from Dec. 12, A. D. 1881, besides costs.

WM. A. MELOY,
In Prop. Per.

* * * * * * *

4 *Answer.*

Filed December 16, 1884.

* * * * * * *

Now comes John F. Keenan, the above-named defendant, and answers the suit at law, No. 25814, brought by the above-named William A. Meloy against this defendant for the recovery of an alleged legal fee in the sum of 400.00, alleged to be due to the said Meloy from this defendant for professional services alleged to have been rendered by him, the said Meloy, in a certain cause in equity, No. 7458, the said cause being an action for divorce by one Sarah J. Thomas against one Johnson P. Thomas.

5 That this defendant was not a party to said suit in equity, No. 7458, and did not employ the said William A. Meloy in any capacity in said cause 7458, nor at any time nor in any manner agree or obligate himself to pay or cause to be paid to the said Meloy any fee or part of fee or any other sum for or on account of any service or services as counsel or otherwise in the said cause No. 7458.

This defendant therefore prays that this suit at law, No. 25814, may be dismissed.

JOHN F. KEENAN.

Joinder of Issue, &c.

Filed October 8, 1885.

* * * * * * *

The plaintiff joins issue with the defendant on his plea filed in the action above entitled.

WM. A. MELOY,
Plaintiff, in P. P.

Last pleading filed October 8, 1885.

WM. A. MELOY,
Plaintiff, in P. P.

5½ SIR: The issue joined in this cause will be tried at the next circuit term of the court.

WM. A. MELOY,
Plaintiff, in P. P.

To J. F. Keenan, Esq., def't.

Service admitted.

Note of Issue and Notice of Trial.

Filed March 3, 1900.

In the Supreme Court of the District of Columbia.

WILLIAM A. MELOY, Plaintiff,
vs.
JOHN F. KEENAN, Defendant. } At Law. No. 25814.

The last pleading was filed in this action October 8th, 1885.

HALLAM & HALLAM,
Attorneys for Plaintiff.
WILLIAM W. BOARMAN,
Attorney for Defendant.

Take notice that the issue joined in this cause will be tried at the next term of this court.

HALLAM & HALLAM,
Attorneys for Plaintiff.

To William W. Boarman, attorney for defendant.

Copy of above received March 2d, 1900.

W. W. BOARMAN.

6 *Motion to Dismiss Suit, &c.*

Filed March 3, 1900.

In the Supreme Court of the District of Columbia.

MARCH 3, 1900.

And now comes the defendant and moves the court to dismiss the above suit, and for cause of this motion assigns the following:

1. Because by operation of law this case has been discontinued and should so appear by the judgment of this court.

2. Because of the delay of the plaintiff to prosecute this suit with diligence and failure on his part to enter continuances.

WM. W. BOARMAN,
Att'y for Def't.

7 To O. B. Hallam, Esq.:

Take notice that on Friday, the 9th day of March instant, at the opening of circuit court No. 2, or as soon thereafter as counsel can be heard, I will call up the above motion.

Truly yours,
W. W. BOARMAN,
Attorney for Defendant.

Affidavit, &c.

Filed March 9, 1900.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

William A. Meloy, the plaintiff in the above-entitled action, having been duly sworn, deposes and says as follows, to wit:

In the early part of the year 1888, this cause having been placed on the circuit term calendar for trial, I agreed with R. Ross Perry, Esq., to appear therein and take full charge of the same as my attorney. He accordingly undertook such attorneyship, and I was ready for trial any day the case might be called; but about the middle or latter part of May, 1888, my said attorney informed me,
and on such information I believe and aver the fact to be, that
8 in talking over the matter with W. W. Boarman, attorney
for the defendant, they had agreed and consented, and on such agreement and consent, in open court, the cause had been referred to Col. J. G. Payne for trial.

I had not been previously consulted, but regarding it as quite within Mr. Perry's control, as my attorney, I expressed myself satisfied with his action and declared myself ready to attend before the referee and try the case whenever it suited his convenience. Mr. Perry said he was so occupied that he could not conveniently go on to the trial for some time, but as soon as he could find leisure he would let me know.

Months passed and I reminded him of the case, and again he assured me that as soon as he possibly could take it up he would consult with Mr. Boarman and fix on a time for the trial before the referee. Later on, at a time when he seemed about to have leisure, we went together over the case, with the court papers, &c., then in his possession, at his office, but almost immediately after and from time to time the giving of notice for trial before the referee was delayed only for Mr. Perry's convenience. Some time ago I called the matter to his attention and asked him to communicate with the defendant's attorney and secure a compromise and settlement at some reasonable amount or arrange for the trial. This, as I was informed by Mr. Perry, he did, and said Boarman professed not to know his client's whereabouts, but promised to communicate with him and advise us. Months having thereafter elapsed without
sign, early last winter I requested Mr. Perry to proceed.
9 Some time later he informed me that on looking over the
court papers and docket he found, to his great surprise, that no entry had ever been made, either of his appearance in this cause as my attorney or of the reference to Col. Payne, and this although the clerk had taken the cause off the trial calendar in May, 1888, and it had never since been on said calendar. I at once personally made investigation and found that such was the fact, but with the help of Mr. Young, the clerk, I was able to find the clerk's trial

calendar for the May term of 1888. On this the cause appeared as No. 32. In the margin opposite was written in pencil the word "Out," and on the other side, "Referred to J. G. Payne." Both these entries Mr. Young declared to be in the handwriting of the late J. J. Camp, then an assistant clerk having charge of the minutes of that circuit term, and I also recognized his handwriting.

Thereupon I asked Mr. Hallam to communicate with the defendant's attorney and secure from him proper stipulation for the trial before said referee or some proposition for some settlement, and being advised by him last week that Mr. Boarman declined to either go before the referee or to compromise, I gave immediate instructions to serve again notice of trial and file note of issue to restore the case to the trial calendar.

Not until after such service did the defense give any notice of motion.

WM. A. MELOY.

Subscribed and sworn to this 8th day of March, A. D. 1900, before me—

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

10 * * * * * * *

FRIDAY, *March* 30, 1900.

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

Upon hearing the defendant's motion to dismiss the above case for want of prosecution by the plaintiff, it is considered that said motion be, and the same is hereby, granted. Therefore it is considered by the court that the plaintiff take nothing by his suit, and the defendant go thereof without day, and recover against the plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

Entry of Appeal.

Filed April 20, 1900.

* * * * * * *

The plaintiff hereby appeals to the Court of Appeals from the judgment of dismissal hereinbefore entered.

Dated 20th April, 1900.

WM. A. MELOY, *P. P.*
O. B. HALLAM,
Attorney for Plaintiff, App'l't.

11 In the Supreme Court of the District of Columbia.

WILLIAM A. MELOY
vs.
JOHN F. KEENAN. } No. 25814.

The President of the United States to John F. Keenan, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 20th day of April, 1900, wherein William A. Meloy is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 21st day of April, in the year of our Lord one thousand nine hundred (1900).

JOHN R. YOUNG, *Clerk.*

[Endorsed:] No. 25814. Law. Wm. A. Meloy *vs.* John F. Keenan. Citation. Issued April 21, 1900. Served copy of the within citation on within-named appellee April 28, 1900. Aulick Palmer, marshal, P. O. B. Hallam, attorney for appellant.

12 Supreme Court of the District of Columbia.

FRIDAY, *April* 20, 1900.

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

By Justice Cole.

Upon motion of the plaintiff, by his attorney, it is ordered that the penalty of the appeal bond in this case be, and the same is hereby, fixed at twenty-five dollars ($25).

Memorandum.

April 20, 1900.—Appeal bond filed.

13 *Motion to Strike Out Approval of Appeal Bond.*

Filed April 23, 1900.

* * * * * * *

And now comes the defendant and moves the court to strike out the approval of the appeal bond approved and filed in the above suit on the 20th day of April, A. D. 1900, for the following reasons:

1. Because the notice required by the rule of court in relation to such a bond was not given to said defendant or his counsel, nor was any affidavit of two clear days' notice of application for such approval to the opposite party in interest made or filed in said cause.

2. Because the surety named in said bond is a member of the bar of this court.

W. W. BOARMAN,
Att'y for Def't.

To Messrs. Hallam & Hallam, att'y- for plaintiff:

Take notice that on Friday next, April 27th, 1900, at the opening of court, or as soon thereafter as counsel can be heard, I will call up the above motion before Justice C. C. Cole.

W. W. BOARMAN,
Att'y for Def't.

Service acknowledged of this motion April 23, 1900.
HALLAM & HALLAM,
Att'ys for Pl't'ff.

14 *Affidavit of W. W. Boarman, &c.*

Filed April 30, 1900.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

I, William W. Boarman, having been first duly sworn according to law, depose and say that I am a member of the bar of the supreme court of said District, and am the attorney for the defendant in the above-entitled suit, and that the notice required by law for the approval of the appeal bond filed in this suit was never served on me.

WILLIAM W. BOARMAN.

Subscribed and sworn to before me this 30th day of April, A. D. 1900.

J. R. YOUNG, *Clerk,*
By W. E. WILLIAMS, *Ass't Clerk.*

* * * * * * *

15 FRIDAY, *May* 18, 1900.

Session resumed pursuant to adjournment, Mr. Justice Cole presiding.

* * * * * * *

Upon hearing the defendant's motion to strike out the approval of the appeal bond herein, it is considered that said motion be, and hereby is, overruled.

Instruction to Clerk.

Filed May 22, 1900.

* * * * * * *

In making up the transcript on appeal herein, the clerk is hereby instructed, on behalf of the appellant, to omit therefrom all save the declaration, plea without jurat, notices of trial and of
16 issue, motion for dismissal, affidavit in opposition thereto, judgment thereon and appeal, omitting also captions of pleadings and affidavits except when it is once inserted at the beginning and omitting all indorsements on papers.

HALLAM & HALLAM,
Attorneys for Plaintiff, Appellant.
WM. A. MELOY,
Attorney and Plaintiff P. P.

Rec'd copy of the above May 21st, 1900.

W. W. BOARMAN,
Def't's Att'y.

Consent to Including Certain Papers in Transcript.

Filed May 26, 1900.

* * * * * * *

I hereby consent, at the request of attorney for defendant, that the following papers filed in this suit be included in the transcript of record for the Court of Appeals of said District, to wit:

1. Affidavit of W. W. Boarman.
2. Motion to strike out approval of appeal bond.
3. Decision of the court overruling said motion, subject to all rules as to the costs thereby incurred.

O. B. HALLAM,
Attorney for Plaintiff.

17 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 16, inclusive, to be a true and correct transcript of the record, as per instructions to clerk and consent of counsel, both in writing, herein filed, copies of which are made part hereof, in cause No. 25814, at law, wherein William A. Meloy is plaintiff and John F. Keenan is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 28th day of May, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

18 In the Court of Appeals, D. C.

W. A. MELOY, Appellant,
vs.
J. F. KEENAN, Resp'd't. } No. 1000.

The appellant states that the supposed error for which he prosecutes this appeal is in the court's dismissal of the action on the defendant's motion, and that the only parts of the record he thinks necessary for the consideration of the questions involved are:

1st. The declaration, with its full title and date of filing, but not including the affidavit attached thereto nor notice to plead.

2nd. The plea, exclusive of the date of filing and venue.

3d. Joinder of issue, pg. 5 of Transcript, omitting venue, but adding note of issue and notice of trial.

4th. Note of issue and notice of trial, with admission of service by defendant's att'y, filed March 3d, 1900.

5th. Defendant's motion to dismiss, without the notice for hearing.

6th. Plaintiff's affidavit, without the caption words, opposing such motion.

7th. Order sustaining the motion for dismissal and the appeal therefrom, omitting from both the words "In the supreme," &c.

8th. All of transcript page 12.

9th. Instructions filed May 22, 1900.

10. Clerk's certificate, page 17 of Transcript.

WILLIAM A. MELOY, *P. P.*
O. B. HALLAM,
Att'y & Counsel.

Receipt of copy of the above statement this 11th day of June, 1900, is hereby admitted.

W. W. BOARMAN,
Att'y for Respondent.

(Endorsed:) Court of Appeals, D. C., April term, 1900. No. 1000. William A. Meloy, appellant, *vs.* John F. Keenan. Appellant's assignment of error and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Jun- 11, 1900. Robert Willett, clerk.

19 In the Court of Appeals of the District of Columbia.

WM. A. MELOY, Appellant,
vs.
JOHN F. KEENAN, Respondent. } No. 1000.

The appellant's counsel will please take notice that, in addition to the parts of the record considered necessary for the consideration of the questions involved and indicated by him, counsel for appellee wishes the following parts of said record to be added :

2. Insert date of filing plea, but omit venue.
5. Include notice of hearing of motion to dismiss.

Print citation.

All of page 13 except caption.
" " " 14 " "
" " " 15 & 16 " "

WM. W. BOARMAN,
Att'y for Appellee.

Received copy of the above this 13th day of June, A. D. 1900.

O. B. HALLAM,
Att'y for Appellant.

(Endorsed:) Court of Appeals, D. C., April term, 1900. No. 1000. Wm. A. Meloy, appellant, *vs.* John F. Keenan. Appellee's designation of additional parts of record to be printed. Court of Appeals, District of Columbia. Filed Jun- 13, 1900. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1000. Wm. A. Meloy, appellant, *vs.* John F. Keenan. Court of Appeals, District of Columbia. Filed Jun- 5, 1900. Robert Willett, clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1900.

No. 1000.

WILLIAM A. MELOY, APPELLANT,

vs.

JOHN F. KEENAN, APPELLEE.

BRIEF FOR APPELLEE.

FRANKLIN H. MACKEY,
WM. W. BOARMAN,
Attorneys for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-1-1900

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1900.

No. 1000.

WILLIAM A. MELOY, APPELLANT,

vs.

JOHN F. KEENAN, APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

This case is here upon appeal from an order of the court dismissing the action for want of prosecution and rendering a judgment for defendant for costs.

The action was begun December 9, 1884, by the filing of plaintiff's declaration (Rec., p. 1).

On the 16th of December, 1884, defendant filed his plea (Rec., p. 2).

After a delay of nearly nine months plaintiff, on the 8th of October, 1885, filed a joinder of issue and notice that the cause would be tried at the next term of the court.

The cause then slept without further prosecution until the 3d day of March, 1900, a period of *fourteen years, four months, and twenty-five days*, when plaintiff again filed a note of issue and notice of trial. Thereupon, on the same day, defendant filed his motion to dismiss the suit for want of prosecution (Rec., p. 3), which, upon hearing, was granted March 30, 1900 (Rec., p. 5).

ARGUMENT.

The only question on this appeal is whether a case which has slept upon the docket of the court for over *fourteen years* ought to be dismissed for want of prosecution.

This court has said, in Parsons *vs.* Hill, 15 App. D. C., 532, at p. 551:

"Suits at common law, which have been duly commenced by the filing of a declaration and the issue of process thereunder, cannot thereafter be permitted to remain indefinitely within the control of the plaintiff alone. The suit should be effectively prosecuted in good faith, or dismissed. Due diligence in such prosecution is an essential requirement on the part of the plaintiff. If that due diligence is wanting, effect should be given to the rule of law *that works a discontinuance of the suit.*"

And the court held that—

"The question of due diligence is a question of fact to be shown to the court by proper proof."

In that case it appeared that the suit had been commenced by the issue of a summons which had been returned, "Not to be found," and thereafter for nearly two years nothing further was done until an alias summons was issued and served. Whereupon the defendant moved to vacate the alias summons on the ground that there had been a discontinuance of the cause. The motion to vacate was granted by the court below, and on appeal this court reversed the order on the ground that the want of due diligence had not been shown.

In the case at bar, however, the facts, as will be seen, are quite different. In this case the summons had been served and the case had gone to issue and notice of trial, and the *record itself* was proof of the want of due diligence in the prosecution of the suit. The failure of the plaintiff during over fourteen years to prosecute his cause, after issue joined and notice of trial, was sufficient to work a discontinuance of the cause, except upon a showing which would be sufficient to excuse the failure. This he attempts to do by an *ex parte* affidavit, giving matters of hearsay as an excuse; but even if the hearsay was admissible, it shows neglect in the prosecution for nearly *four* years when plaintiff says he was advised of the condition of the case. This was, as he admits, in 1888, and from that day to 1900, nearly twelve years, he has allowed the case to sleep, so that on his own showing he has been guilty of gross negligence in following up and prosecuting his cause. The defendant had a right to assume that he had long since abandoned the case and allowed it to be discontinued. The law does not require a defendant to spur a plaintiff to action, nor to keep him moving when once started. A defendant need not move until compelled by rules of *law to do so.*

"The failure or refusal of the plaintiff to prosecute his suit within a reasonable time will authorize its termination by the court in which it was brought upon the motion of the defendant" (Ency. Plead. and Proc., vol. 6, p. 904, citing numerous cases).

After the appearance of the defendant, when from any delay or other fault of the plaintiff in any subsequent stage of the case he has not followed the remedy he has chosen, for such delinquency or mistake he may be non-prossed and is liable to pay the costs.

Horner *vs.* Brown, 16 How., 354, at p. 365.
Flannagan *vs.* Smith, 21 Texas Rep., 493.
20 New Jersey Law Rep., at pages 209, 304.

Even if it be true, as plaintiff claims in his affidavit, that there had been a rule of reference (and the best evidence of that is the record, and *no record* thereof is shown), he was grossly negligent by his own showing in not following it up. Surely, after a case has been referred for over twelve years, the party whose business it is to prosecute the reference is guilty of gross negligence if he takes no step during that period to see that the reference is made effectual.

The case of City of Louisville *vs.* Meglemery, 52 S. W. Reporter, 1052, cited and relied on by appellant, is far from sustaining his contention. All that was held in that case was that delay in prosecuting a cause would not set the statute of limitations in motion, the running of which had been stopped by the bringing of the suit.

The judgment of dismissal by the court below ought, therefore, to be affirmed.

FRANKLIN H. MACKEY,
WM. W. BOARMAN,
Attorneys for Appellee.